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IN THE

# Supreme Court of the United States.

No. 220.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

vs.

THE L. BUCKI & SON LUMBER COMPANY

## BRIEF REPLYING TO AND POINTING OUT ERRORS OF FACT IN THE BRIEF OF PETITIONER.

In the Circuit Court The L. Bucki & Son Lumber Company was Plaintiff, and the Fidelity and Deposit Company was Defendant, and We Will So Designate Them.

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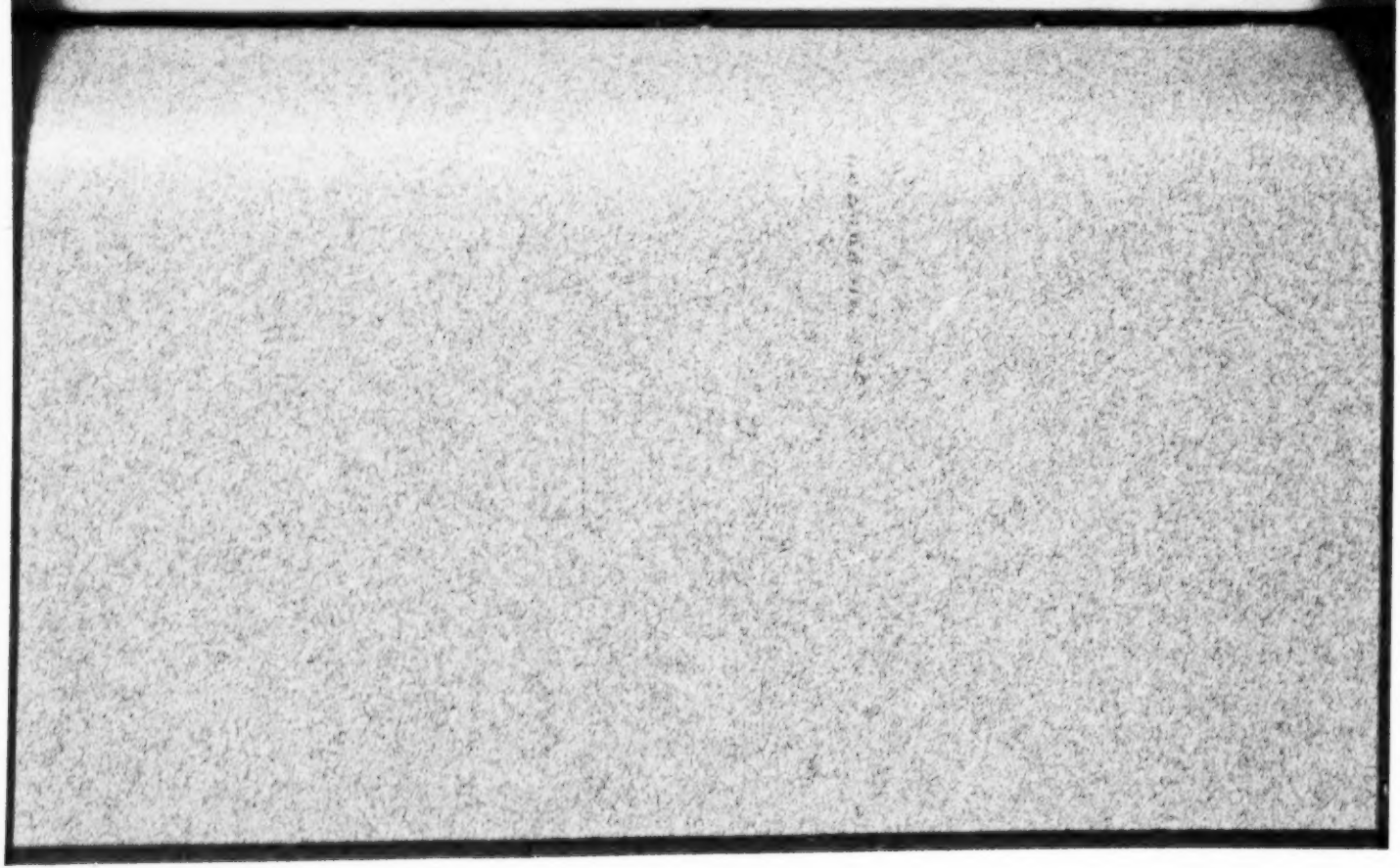

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## I—ERROR OF DENENDANT.

Defendant in its brief assumes that the trial Judge, submitted to the Jury, the question of damages, to plaintiff's credit, caused by the attachments, as a separate and distinct element of damages. This is not true and plaintiff com-

plains because that question was not submitted to the jury. See Instruction on that subject requested and refused. Rec. p. 103.

## II—ERRORS OF DEFENDANT.

Defendant in its brief assumes and argues that the trial Judge submitted to the jury the question of damages from the loss of the use of its mill plant for the entire period of 20 months the lien of the attachments rested on its properties.

This is not true, and plaintiff complains because the Court refused to submit that question to the jury. See instructions requested, and refused, Rec. p. 102-3-5-6-7, and 108.

Such an instruction if given as to loss of use of plaintiff's mill plant, would have been absolutely inconsistent, with the instructions given, to wit: A. With the instruction to allow plaintiff interest on the value of the lumber attached while the attachments rested on such lumber. See instruction given. Rec. 109.

B. Such an instruction to allow damages for loss of the use of the mill plant would have been irreconcilably inconsistent with the instructions given to allow as damages, wages paid idle employees, and watchmen during the time the mill plant could not be used, in consequence of the attachments.

See instructions given on those subjects, Rec. 175-176.

C. Such an instruction to allow damages for loss of use of mill plant would have been inconsistent with instructions given allowing as damages the difference between what purchasers had to pay for lumber they purchased in the market to make up deficiencies of lumber purchased from plaintiff and not delivered.

See instructions given on that subject, Rec. 179.

D. The trial Judge only submitted to the jury the question of damages for the loss of the use of plaintiff's plant for the period of time between Oct. 1 and Oct. 11, 1897, and the jury so understood it as, shown from their general verdict which was for only $10,880. Rec. 28, and Rec. 102 near the top.

## III—ERRORS OF DEFENDANT'S BRIEF.

Said Brief states on p. 5, that it was admitted by Bucki Company, that after the Atlantic Lumber Co. refused on Oct. 1, 1897, to deliver any more logs. "It would have been necessary for it to have embarked in the logging business and it proved by one Murphesee that such an enterprise would have required an investment of from $150,000 to $250,000."

This is not true. There is no testimony in the Record that plaintiff would have had to engage in the logging business to supply its mill with logs after Oct. 1, '97. On the contrary, the evidence establishes, that plaintiff up to Oct. 1, had paid the Atlantic Lumber Co. seventy-five cents per thousand feet more than the market price of logs. That logs were supplied in the Jacksonville market by the St. Johns River and by railroad by loggers other than the Atlantic Lumber Co.

See testimony of Barker, Henry Clark and Cashhen, the latter two owners of saw mills in Jacksonville. Rec. pp. 80-81. Cashen testifies that his logs for the year 1898 cost him only $5.80. Rec. 81, near top. Whereas plaintiff had been paying under contract with the Atlantic Lumber Co. $7.25 per M. See paragraph 5 of contract. Rec. 91 near bottom.

Arthur Meigs, the General Manager of the Atlantic Lumber Co., testifies that after its refusal, on Oct. 1, to deliver any more logs to plaintiff, it still continued to get out and sell in Jacksonville, 2,000,000 feet per month. Rec. 81, near bottom.

The Atlantic Lumber Co. prior to Oct. 1 had sold and delivered all its logs to plaintiff, and as after that date it delivered all its logs, to other manufacturers and mill owners, necessarily, the plaintiff could have bought from the river loggers, and other loggers, their logs, which before then they sold to other mill men.

The statement in defendant's brief is not true for the further reason, that, there is always a supply for a demand for articles, easily obtainable, and, by this law of supply and demand the presumption is, that the plaintiff would

have obtained all the logs it needed to supply its mill, especially by offering for them $7.25, which it had been paying the Atlantic Lumber Co., or $.75 more per M. than the market price.

## WHAT PLAINTIFF DID PROVE.

It proved that it could have supplied its mill with logs, had it been necessary within 60 days after Oct. 1 by engaging in logging itself.

Its own officers testified plaintiff could have done it within 60 days. Rec. p. 82, near top.

Daniel G. Ambler, the President of the Atlantic Lumber Co., testifies it could have been done in 60 days. Rec. p. 81.

And plaintiff proved that it had control of 33 miles of iron rails for spur tracks; 52 flat cars, or car trucks, and 3 locomotives, which with some repairs, were available for a logging plant. Rec. 69, middle of page.

All the capital plaintiff needed to engage in logging, would only have been sufficient to buy logging, carts, mules and harness.

Murphee's testimony as to the requisite logging plant would have cost, including iron rails, cars, and engines was entirely illegal. He was a mere salesman in New York City. He knew nothing about the costs of a logging equipment. It is not shown that he knew anything about the business. Rec. 87.

Such testimony, if not ruled out, is incompetent, would have had no weight with a jury, as against the testimony of Meigs, the General Manager, of the Atlantic Lumber Co., with large experience in the business. He testified that a complete logging plant, including rails, cars, and engines adequate to get out 2,000,000 feet per month, would cost from $50,000 to $75,000. Rec. 71, near bottom.

And Barber, testifies, that with using a tram road he with an expenditure of $6,500 got out 10,000 feet per day (250,000 per month). Both Meigs and Barber, as well as Murphee, were defendant's own witnesses.

So that there was ample testimony to justify a finding

by the jury that plaintiff by purchasing logs in the market, or logging itself, or both, it could have fully supplied its mill with logs, and that it had the means to do both.

And it being established that there was an abundant supply of logs, standing in the forests, accessible by rail and water from plaintiff's mill, the burden of proof rests on the defendant to establish that the plaintiff must have closed its mill business for want of logs, (not that it might have to do so), if the attachments had not issued.

## V—CREDIT BAD, ERROR IN DEFENDANT'S BRIEF.

On p. 5 of defendant's brief near the bottom it is asserted that: "It was established by the evidence and not disputed that in September, 1897, the credit of the Bucki Company was very bad."

This statement is flagrantly untrue, and is based on the testimony of H. W. Simmons.

In the first place such testimony merely expressing the opinion of the witness, H. W. Simmons, that plaintiff's credit was bad in September, without showing that he had any knowledge of the assets and liabilities of plaintiff, was incompetent and illegal.

Rec. 86. His opinion was based on the fact that in July and August, some of plaintiff's drafts given for logs delivered went to protest, but "were taken up within a day or two, or so after the same was protested, except one draft for $5,340 given in August, which had not been paid Oct. 1."

The evidence in the Bill of Exceptions, presented by the plaintiff, fully explains that all drafts that were protested and paid between July 15 and August 15, were given on time, on the expectation that vessels would be chartered to remove the lumber, and enable the plaintiff to realize on its lumber, and that such vessels could not be obtained.

Such drafts did not go to protest, because of the want of ample assets, to-wit: lumber; but because of the unexpected emergency of want of vessels to remove and convert the same into cash. If the witness had not been a prejudiced and partial witness he would not have testified

that plaintiff's general credit was bad, because a few drafts went to protest, under the circumstances stated and of which he as an employee, is presumed to have known, which drafts were all immediately paid.

Such facts among impartial business men, would not seriously affect the general credit, of a business concern with knowledge that it had ample assets to meet all its liabilities, and continue in business.

As to the draft for $5,340, that was given August 19, and dated August 16, due ten days after date. It was held by the National Bank of Jacksonville, in Florida, and it is an undisputed fact that it was the only piece of matured commercial paper the plaintiff owed, on October 1.

It is also undisputed that $2,000 of that draft, was not for plaintiff's debt, but as an advance to the Atlantic Lumber Co. for logs to be delivered after August 16.

Although such draft matured August 26, the bank that held it manifested no concern about it, and cashed other paper of plaintiff, before it was paid, and that plaintiff had a setoff against it for $4,000.

On p. 188 of Record, the testimony of this witness is repeated.

On p. 86 he states that: "the company in September was unable to obtain loans from New York banks," and gives his opinion as to how much money plaintiff ought to have had to continue in business. And that the funds of the company were largely absorbed in paying a dividend declared in May, 1897. Rec. p. 87, near top.

But, the President of the plaintiff testifies, that the witness Simmons "had no authority to negotiate loans at the Bank of New York." Rec. 87 near top.

It certainly is no reflection on plaintiff's financial standing, that one of its employees was unable to obtain a loan from a bank, in New York, who had no authority to do so. Simmons was not what he pretended to be—the financial agent of the plaintiff. In respect to paying a dividend, (6 per cent. on $250,000), declared in May, it is obvious the dividend was declared when plaintiff was anticipating shipments of lumber to meet its liabilities.

While all business men know that if one is unfortunate enough to have a piece of its paper protested, banks, become suspicious of him, though he may have ample assets and his general credit not affected.

As against the opinion of Simmons, illegally allowed, we have, the undisputed evidence that, the plaintiff paid the contract price of all logs delivered, up to September 15, though for several months far below the guaranteed size; that, the A. L. Co. attached on October 1, for the installment of logs falling due, on that day, when plaintiff had the entire day to pay it in. And it is a conceded fact, on October 4, four days after the attachment, plaintiff paid on a writ of garnishment, a debt due one Schwaab, $2,500, and on October 11, paid its employees, $5,900—all it owed them, and continued in business and operation its mill until November 16, when all the logs on hand had been sawn up. And received on account of lumber shipped, $14,055.74, in October, $22,846.57, in November, and $2,483.63 in December, and had on hand 3,700,000 feet to be disposed of. Rec. 20, near top.

Besides, it had completed on September 30, a sale of boards for $25,000, the shipment of which was prevented by the writs of attachment, Rec. 72.

Again. "Testimony was adduced tending to prove that at no time prior to October 1 had the plaintiff been refused credit in Jacksonville, Fla., where it did business. Rec. 86, near bottom.

We submit therefore, that the testimony of Simmons is wholly untrustworthy, and utterly worthless, as testimony to establish the plaintiff's inability to continue in business, after October 1.

A fly on a wheel would be as ineffectual to prevent its revolving.

## VI—ERROR IN DEFENDANT'S BRIEF.

On p. 42, of defendant's brief it is said: "The Bucki Company's position is, had we possessed sufficient credit, we could have borrowed the money necessary to continue business."

That statement is untrue.

There is not a word of testimony in the Record, to warrant such a statement.

Such was not and is not, plaintiff's position. Its position was and is that our personal assets, taken away wrongfully by the attachment, as good as gold at the market price, were ample to have enabled it to have continued in business—to say nothing of the general credit arising from the ownership of its mill plant costing $130,000, exclusive of ten acres of land in good condition, and not a lien on it.

## VII—ERRORS OF FACT IN DEFENDANT'S BRIEF, PP. 56 AND 57, UNDER LETTER "B."

This is a statement of alleged facts and figures, claiming that plaintiff in cutting lumber on hand, October 1, and in cutting lumber sawn after October 1, up to November 16 lost, $10,000.

This is inexcusably untrue.

This statement avers that plaintiff shipped prior to December 28, all the lumber it had on hand Oct. 1, and all it manufactured afterward "except about 2,000,000 feet of old and second-class boards." Defendant's brief, p. 56, near bottom. The Record contains no evidence to support such an assertion.

Defendant's exception No. 14 1-2, Rec. p. 185, consisted of a refusal of the Court to give an instruction to the jury. Such instruction asserted that all the lumber plaintiff had on hand December 1 had been shipped "except about two million feet." But the Court refused to give such instruction.

The Bill of Exceptions states that all the lumber was shipped "except a portion of old lumber and second-class boards (not old and second-class boards), Rec. p. 200. It does not state that the second-class boards were old. Nor does it state the quantity of "old lumber and second-class boards," remaining on hand December 28 and not shipped.

But the bill of exceptions on p. 48, near middle of p. does state that the actual quantity of manufactured timber and lumber levied on October 1 was 5,200,000. It does state that between October 1 and November 16 there was manufactured 3,600,000, Rec. 62. Total 8,800,000.

The bill of exceptions does state there was shipped in October, November and December 5,120,358, Rec. p. 200.

Leaving balance on hand, 3,679,742.

There is no evidence in the Record to show the total amount at the selling prices, the 5,120,358 feet shipped, brought.

The bill of exceptions, p. 201, simply says that, plaintiff received on account of lumber shipped in October, November and December, $39,385.94. But it does not undertake to state the entire amount the 5,120,358 sold for—obviously it was much more than $39,385.94 for that sum would be only about $7.50 per M., whereas the logs cost $7.25 per M.

At $7.50 per M. plaintiff could not have made a profit of $5,000 per month, which the trial Judge certified; its books and testimony showed it did make.

Again, there is no evidence in the Record to show when the 3,679,742 feet were sold, or how much it brought—but even at cost of logs—would be $27,698.06.

Notwithstanding such undisputed facts, defendant's brief, p. 57, assumes that the total amount for which the 8,800,000 feet sold for was only $39,385.94.

To which defendant adds amount of bills received, $15,000, making $54,385.94.

Defendant then assumes that plaintiff's total indebtedness on October 1 (after operating its mill for 4 1-2 years), of $60,000, all arose while sawing the 8,800,000 (which represents its output for 3½ months at 2,500,000 feet per month), and deducts from $60,000, the $54,385.94 and calls the difference $10,000, as the cost of operating the mill in excess of its sale of lumber, Rec. 57.

Such a misstatement of facts and figures is nonsense, too transparent to mislead anybody.

Counsel seems to have forgotten that it is an undisputed fact, plaintiff had paid for all logs sawn up to November 16, except the deliveries made by the Atlantic Lumber Co. between September 14 and October 1, amounting to less than $8,000; that it had paid Schwaab October 5, $2,500, and the employees $5,900 on October 11, which was all that was due them, of $8,400, of the $60,000 liabilities. On October 1

$16,400, only remained unpaid, arising from operating its mill, and that the Court had certified the lumber on hand, was worth at least, $65,000, and its bills receivable $15,000, and had made a net profit in nine or twelve months of $5,000 per month, Rec. 68, 82.

| | |
|---|---|
| The timber on hand, | $65,000 |
| Bills received | 15,000 |
| Total | $80,000 |

After paying the said $8,400, its liabilities were $63,000—$8,400=$54,600, of this $2,000 was an advance in the draft of $5,340, which reduced its liabilities to $52,600, which deducted from $80,000, leaves $27,400, which would represent the profit made in three and a half months of its business, less taxes, insurance, and repairs, and undoubtedly 8,800,000 feet, 2-3 of it square timber actually sold for much more than $65,000 as that would be less than $7.50 per M., or only $.25 more than the logs cost.

Anyone looking at the current prices of square timber and first-class boards, during the year 1897, can know that the market price of such stuff was $10 to $12 per M.

The defendant's misstatements of facts are futile to overcome the evidence of the books of the plaintiff, establishing a profit of $5,000 per month prior to October 1, although owing to want of room to pile lumber, the mill had to be shut down during a part of August and September.

## VIII—ERROR OF DEFENDANT, COUNSEL FEES.

On p. 34 of its brief, the defendant makes the point that plaintiff's motion to dissolve the attachment for $75,000 involved some of the same issues that were raised by the pleadings on the merits; that on the pleadings on the merits, the issues were substantially made up before the motion to dissolve was tried, and that plaintiff ought to have waited until the parties were prepared to go to trial on the merits, and until the Court had reached the case for trial on the merits. And that the trial of the motion,

in advance of the action on the merits unnecessarily caused the services of counsel on the motion and therefore plaintiff ought not to be compensated for such counsel fees. The motion was made months before such issues were made up. To such a suggestion or contention, there are several complete answers.

1st. It would completely nullify the statute providing that the courts shall be always open to hear motions to dissolve attachments and nullify the policy of the law to give a speedy hearing in such cases.

2d. Although the issues on the merits might be made up at the time of trial of the motion, yet it might be months or a year before the case would be reached in its order, on the trial docket, or before the parties were ready for trial on the merits, and in the meantime, the pending of the attachments would ruin the defendant in attachment.

3d. The issues on the motion and on the merits, were not, and rarely ever, could be the same. On issue of indebtedness, on merits, plaintiff would recover if he proved any debt, no matter how small; but on such an issue on the motion it would be only necessary for the defendant to establish that the amount due was substantially less than the amount of the attachment,

4th. In the case at bar, another distinct action was consolidated, with the action in which the auxiliary writ for $75,000 was issued; and the issues on the merits of the former action had no connection whatever, with the issues on the motion to dissolve in the latter.

5th. Counsel cites Western vs. Jones, 41 Fla. 188 (not 241), That was a case for a preclosure of a mortgage lien, in which a general attachment had been issued. The Court decided that such an attachment was not authorized by the statute. But also rendered that in a common law action, it was error for the trial Court to refuse to order formal pleading to be made up, so that the issues on the merits and on the motion could be tried together. The Court did not rule that such issues must be tried together.

Besides having decided that the writ was illegal in a foreclosure case, it had no occasion to decide anything else,

and what it said about making up the issues on the merits was a mere dictum.

That case was decided two years after the motion to dissolve the $75,000 writ, was heard, and the Federal Court had a perfect right to direct the time when the motion should be heard, there being no local law to the contrary.

6th. The fact that subsequently on the trial of the merits some of the same questions arose, that had previously arisen, on the trial of the motion to dissolve, necessarily does not affect the right to counsel fees.

If defendant chose to recontest points previously decided, it was its own fault.

## CONCLUSION.

The three important ultimate facts in this action are:

1st. The plaintiff successfully did business at a good profit for four and a half years.

2d. The writs of attachment interrupted and destroyed that business.

3d. That plaintiff was able on October 1, 1897, to continue in business, if the attachments had not been issued.

H. Bisbee
for plaintiff